IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 201 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF DECD. BHIKHABHAI H PATEL

Versus

HEIRS OF DECD. PARSOTTAMBHAI Z PATEL

Appearance:

Mr. M.C. Shah, for the appellants.

MR NK MAJMUDAR for the Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 01/12/2000

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated 1st March 1982 passed by the then learned Extra Assistant Judge, Nadiad, in Regular Civil Appeal No. 76/80 reversing the decree dated 25th February 1980 passed by the then learned Civil Judge(JD), Borsad, dismissing Civil Suit No. 132 of 1967 by allowing the appeal and passing the decree for specific performance of contract dated 12th June 1950, original-defendants have preferred this appeal.

2. Uttambhai Patel and Dadabhai Patel were the brothers. Lallubhai was the son of Uttambhai, and Punambhai was the son of Lallubhai. Dadabhai was having three sons namely (1) Shivabhai, who died unmarried, (2) Bhaijibhai and (3) Haribhai. Bhaijibhai had a son named Zaverbhai and Purshottambhai was the son of Zaverbhai who was the original-plaintiff. Bhikhabhai, Mangalbhai were and Dahyabhai is the son of Haribhai who are original-defendants No. 1, 2 & 3. Natubhai the original-defendant No.4 is the son of Bhikhabhai Haribhai Patel, the original-defendant No.1. Mangalbhai Haribhai Patel, original-defendant No.2 died during the pendency of the suit and so Shantaben, his widow was joined as defendant No.2-A in the suit. During pendency of the appeal in the District Court at Nadiad, Purshottambhai Zaverbhai Patel, original-plaintiff died, but his heir or legal representative was not brought on record. During the pendency of this appeal Bhikhabhai Haribhai Patel and Dahyabhai Haribhai Patel, the appellant Nos. 1 & 3 respectively died and hence their heirs and legal representatives are brought on record. Bhikhabhai, Shantaben, Dahyabhai and Natubhai having failed in appeal in the District Court at Nadiad, wanted to file this appeal. They therefore only for the purpose of filing the appeal obtaining necessary permission of this Court filed this appeal against Dahyabhai Zaverbhai Patel, the brother and only heir of deceased Purshottam Zaverbhai Patel (Ori.Plaintiff). Dahyabhai Zaverbhai Patel also died during the pendency of this appeal and so his widow Shantaben and minor son Deepakkumar are joined as respondents Nos. 1-A & 1-B. For convenience, I will refer the parties by their names.

3. Punambhai Lallubhai was the owner of 8 properties, referred to by parties as Lat (for short the suit properties). He sold the same to Shivabhai Dadabhai executing a sale deed dated 15th June 1944 (Ex. 153). Shivabhai Dadabhai on 12th June 1950 in writing agreed to reconvey the said properties to Punambhai Lallubhai. The said writing is produced at Exh.203-A. In the writing Shivabhai Dadabhai made it clear that he would not be reconveying the properties, but after his death by paying Rs. 3000/= to his heirs and legal representatives, Punambhai Lallubhai would be able to get those properties. Thereafter on 30th April 1951 vide sale deed Ex.154 Shivabhai Dadabhai sold the properties to the defendants No. 2 & 3 Mangalbai Haribhai and Dahyabhai Haribhai Patel, while on 19th December 1952 executing the gift deed Ex. 137 Punambhai Lallubbai gave the suit properties to Purshottam Zaverbhai in gift. It is mentioned in the said gift deed that the suit properties

were mortgaged with Shivabhai Dadabhai and the same could be redeemed on payment of Rs.3000/=. Shivabhai Dadabhai died on 11th April 1967. Purshottambhai Zaverbhai then believed that the right to have the reconveyance of the suit properties accrued to him from the day Shivabhai Dadabhai died. He therefore asked Bhikhabhai Mangalbhai and Dahyabhai Haribhai the defendants Nos. 1 & 3 his nephews to execute the sale deed on payment of Rs. 3000/=but the defendants did not pay any heed to his request. Purshottambhai Zaverbhai therefore filed Regular Civil Suit No. 132 of 1967 in the Court of Civil Judge (JD) at Borsad, against (1) Bhikhabhai Haribhai Patel, (2) Mangalbhai Haribhai Patel, (3) Dahyabhai Haribhai Patel, his nephews, and (4) Natubhai, the son of Bhikhabhai Haribhai Patel for specific performance of the agreement dated 12th June 1950 (Ex.203-A).

4. Bhikhabhai Mangalbhai, Dahyabbai, and Natubhai the defendants Nos. 1 to 4 appeared before the trial court and filed their written statement at Ex.11 denying the allegations levelled against them and contending inter alia that Punambhai Lallubhai had already sold the suit properties to Shivabhai Dadabhai by a registered sale deed dated 15th June 1944 (Ex.153). Consequently Shivabhai Dadabhai had became the sole owner of the suit properties. However Punambhai Lallubbai was allowed to stay in the house described as Lat No. 8 during his life time. Shivabhai Dadabhai was having no right to execute the suit agreement dated 12th June 1950 (Ex.203-A). It is therefore not binding to his heirs. Shivabhai Dadabhai had sold the suit properties to them after receiving Rs. 3000/= as consideration and they were put into the possession by Shivabhai Dadabhai. Bhikhabhai Haribhai Patel, defendant No.1 got the possession of the suit properties as the purchaser and not as the heir & legal representative of Shivabhai Dadabhai. The suit agreement dated 12th June 1950 was therefore not binding to them. The document dated 15th June 1954 (Ex. 153) was not the mortgage deed but it was the sale deed. They were not knowing that the suit agreement dated 12th June 1950 was entered into and the suit properties were to be reconveyed on payment of Rs.3000/=. The document dated 30th April 1951 (Ex.154) was without any consideration. Punambhai Lallubbai had no right to give in gift the suit properties after 15th June 1944 when he executing the sale deed (Ex.153) sold the suit properties to Shivabhai Dadabhai. Raising the plea about limitation and application of Bombay Prevention of Fragmentation Act they submitted that Punambhai Zaverbhai, the plaintiff, was not entitled to any relief.

5. Natubhai Bhikhabhai the defendant No.4 is joined as the party because a will in his favour is executed. He in his written statement (Ex. 182) contends that the will is legal and valid and is beyond any challenge.

6. On the basis of the pleadings,the then learned Civil Judge (JD) framed necessary issues at Exhibit 14. Considering the evidence on record, he on 25th February 1980 dismissed the suit with no order as to costs. Being aggrieved by the judgment and decree of the trial court Purshottambhai Zaverbhai Patel, the original-plaintiff preferred Regular Civil Appeal No. 76 of 1980 in the District Court, Kheda at Nadiad. The then learned Extra Assistant Judge, Nadiad, to whom the appeal was assigned for hearing and disposal in accordance with law, hearing the parties appearing before him allowed the appeal on 1st March 1982 and directed abovenamed defendants to execute the sale deed in favour of Purshottambhai Zaverbhai, while Purshottambhai Zaverbhai was directed to deposit the sum of Rs. 3000/= in the court. Being aggrieved by the judgment and decree passed by the appellate court Bhikhabhai Dahyabhai, Natubhai and Shantaben, the widow of deceased Mangalbhai Haribhai filed this appeal against Dahyabhai Zaverbhai Patel, the brother of original-plaintiff Purshottambhai Zaverbhai Patel obtaining necessary permission of this Court. It may be stated why such permission filing Civil Application No. 2110 of 1982 was sought for. On 20th August 1980 the learned Extra Assistant Judge heard interim application Ex.10 in appeal and thereafter on 17th August 1981 he partly heard the appeal. Thereafter on 6th October 1981 written arguments were submitted. On 16th December 1981 the learned advocate for the respondent in that appeal prayed for time. Thereafter on 3rd February 1982 Purshottambhai Zaverbhai, the plaintiff who had preferred the appeal died. The parties either being ignorant about the death or for any other reason did not bring it to the notice of the Court that Purshottambhai Zaverbhai the sole appellant had expired. The court thereafter on 17th February 1982 heard further arguments. After the arguments of the parties appearing were over, the then learned Extra Assistant Judge on 1st March 1982 delivered the judgment and passed the decree challenged in this appeal. Purshottambhai Zaverbhai, the plaintiff was unmarried. The appellants, who were aggrieved by the judgment and decree passed by the lower appellate court wanted to file this appeal, but having come to know that Purshottambhai Zaverbhai, the sole appellant before the lower appellate court had expired and without bringing his heirs and legal representatives on record the judgment and decree were passed by the

lower appellate court, they could see that necessary permission to file the appeal against Dahyabhai Zaverbhai Patel, the brother and sole heir of deceased Purshottambhai was necessary. Hence, they filed aforesaid Civil Application for necessary permission. On the permission being granted the present appeal has been filed challenging the legality and validity of the decree passed by the lower appellate court.

7. Assailing the judgment and decree, Mr. Shah, the learned advocate representing the appellants submits that the suit agreement dated 12th June 1950 (Ex.203-A) is not the valid agreement in the eye of law because in that case the mutuality is wanting. If the said agreement is perused, it would appear that there is no obligation on the part of Purshottambhai to purchase the property and likewise there is no obligation on the part of the heirs and legal representatives of Shivabhai Dadabhai to reconvey the properties to Punambhai Lallubhai. Shivabhai Dadabhai did not bind himself saying that he would reconvey the properties. What is made clear in the suit agreement by Shivabhai is that after his death if Punambhai Lallubhai so desired he could purchase the suit property. Thus there is no promise to reconvey the property which is one of the essential requirements of a valid contract in the eye of law. The agreement thus being invalid or no agreement in the eye of law, it cannot specifically be enforced, and no decree in that regard can be passed. In short, when Shivabhai Dadabhai did not bind himself to sell the property, and his heirs are consequently not bound to esteem the suit agreement, the lower appellate court ought not to have passed the decree for specific performance of the suit agreement. Shivabhai Dadabhai, when sold the suit properties to Bhikhabhai, Mangalbhai and Dahyabhai, the defendants Nos. 1, 2 & 3 vide sale deed dated 30th April 1951 (Ex.154) was the sole-owner, and being the sole owner he had a right to sell the suit properties. Bhikhabhai and others had therefore on the execution of the sale deed dated 30th April 1951 (Ex.154) become the absolute sole owners of the suit properties. Punambhai Lallubhai, after having sold the suit properties on 15th June 1944 to Shivabhai Dadabhai vide sale-deed (Ex. 153) was having no right, title and interest in the suit properties. However, he on 19th December 1952 gave the suit properties in gift to Purshottambhai Zaverbhai the plaintiff,executing the gift deed (Ex.137). The gift cannot be said to be legal and valid because Punambhai Lallubhai was not the owner, and having no right, title and interest in the suit properties he had no better title to pass. Purshottambhai Zaverbhai, the plaintiff

therefore did not acquire any right,title and interest in the suit properties. Consequently he even did not acquire a right to seek specific performance of the suit agreement (Ex. 203-A) Shivabhai Dadabhai entered into with Punambhai Lallubhai on 12th June 1950. Not only on such questions of law the judgment and decree are assailed, but also assailed on one more point. According to the appellants, the decree passed by the lower appellate court is a nullity because hearing of the appeal was not over when Purshottambhai Zaverbhai died on 3rd February 1982. On that day the appeal was partly heard and was adjourned for further hearing to 17th February 1982. Thereafter without bringing the heirs and legal representatives of deceased Purshottambhai Zaverbhai on record, the appeal was heard and decree was passed. Thus the decree which came to be passed in favour of the dead person is a nullity, and so it is urged that allowing this appeal, appropriate order setting aside the decree may be passed.

8. In reply to such contentions, Mr. Majmudar representing the respondent cites numbers of decisions and submits that appeal before the lower appellate court did not abate because within the period of 90 days available in law for bringing the heirs on record after the death of Purshottambhai Zaverbhai, the appeal was disposed of. In the case of Padmaram and Others Vs. Surja and Others 1961 Rajasthan 72, appeal from preliminary decree in partition suit was filed. One of the appellants died during the pendency of the appeal and within time legal representatives were not brought on record. It was held that right to sue did not survive in limine appellant alone and appeal automatically abated qua the deceased appellant. Such is not the case here is the submission of Mr. Majmudar. In another case of Works Manager, Central Rly, Workshop, Jhansi Vs. Vishwanath and Others - AIR 1970 SC 488, it is made clear that if all the respondents are made parties and one of them dies during pendency of an appeal but if his name continues in array of respondents, the appeal would not abate. The appeal or the suit abates when legal representative and heir of the dying party are not brought on record within the period of 90 days of the death because in view of Order 22 Rules 3 & 4, C.P. Code, a period of 90 days is provided for bringing the heirs on record and the Court has to wait till the period of 90 days expires. If within the period of 90 days the heirs and legal representatives are not brought on record, the suit or the appeal would stand abated. In the case on hand, Purshottambhai Zaverbhai died on 3rd February 1982. On that day hearing was not over but

thereafter further arguments were heard on 17th February 1982 and on 1st March 1982 the judgment was delivered. It therefore follows that within the period of 90 days of the death, the judgment was delivered. When that is so, the appeal cannot be said to have abated. Mr. Majmudar, ld. advocate at this stage when query was made fairly concedes that other authorities cited by him will not be helpful in deciding the point in question and so the Court may not refer in the Judgment. Being not relevant, I do not refer other authorities. He at last urges to refer the suit back to the lower appellate court, if at all the decree is found to be the nullity, and some formalities after the death of Purshottambhai Zaverbhai required to be undergone were not but ought to have been, for bringing heirs on record.

9. It is also his submission that even if the decree is passed by the lower appellate court in ignorance of the death of the party, the decree will not be a nullity especially when this appeal seeking necessary permission, and joining Dahyabhai Zaverbhai Patel as party-respondent has been filed. In support of his such contention he refers the decision in the case of Raddulal Bhurmal and Others Vs. Mahabirprasad Bisesar Kalwar and Others AIR 1959 Bombay 384 wherein in respect of foreclosure suit it is held that if the court proceeds with the case in ignorance of the fact of death of a party and passes a decree, the same cannot be treated as a nullity. At the most, it may be a wrong decree and will have to be set aside by taking appropriate proceedings as would have been the case had the points been raised but wrongly decided by the court. Such decree cannot simply be ignored nor can the court refuse to make it final.

10. In view of the above stated dates indicating the development & progress made in the appeal and hearing held after the death of Purshottambhai Zaverbhai, the court being ignorant about the death, passed the impugned decree and disposed of the appeal within 90 days of the death of Purshottambhai Zaverbhai the period within which the heirs are required to be brought on record, the appeal cannot be said to have abated, but in view of the decision of this Court rendered in the case of Jiviben Lavji Raganath Vs. Jadavji Devshanker & Ors. 18 GLH 883, the decree passed in this case must be held to be the nullity. It is laid down in the decision that if the sole plaintiff or appellant dies during the pendency of the appeal or suit and the decree is passed in favour of the dead person, the decree will certainly be a nullity making it further clear that if the sole plaintiff or the sole appellant dies and his heirs & legal representatives

are not brought on record within the period prescribed, the court lacks inherent jurisdiction because there is no proceeding before the Court in which the Court is seized of the lis between the parties. In such case the Court lacks inherent jurisdiction to pass any order, and if the decree is passed in ignorance of death of sole appellant, the decree would evidently be a nullity. In view of such decision of this court, the decree passed by the lower appellate court is a nullity.

11. What happened in Raddulal Bhuramal's case (Supra) was that the plaintiffs in that case instituted a suit in 1941 for enforcement of their mortgage. In that suit a preliminary decree was passed. After the period for redemption expired the plaintiffs made an application for passing the final decree for foreclosure. It was brought to the notice of the Court at that time that the original-plaintiffs Nos. 1, 6, 9, 11 & 13 had died and their legal representatives were required to be brought on record. The plaintiff No.13 had died in 1944 or so. The other side contended that when the legal representatives were not brought on record the preliminary decree passed was a nullity and suit abated as a whole. In that case, plaintifff No.13 had died prior to passing of the preliminary decree. Keeping Rule 3 of Order 22 of Civil Procedure Code in mind, it is held that the Court has to examine the materials for determining that one of the plaintiffs had died and that the right to sue does not survive to the surviving plaintiff. The question as to when plaintiff died is one of the facts which is required to be alleged and proved. Similarly, the question whether the right to sue does not survive to the surviving plaintiff is also one of the facts and has to be decided by the Court. Unless such questions are raised before the Court at the appropriate time, it is not possible for the Court to decide the question. In such case if the Court proceeds with the case in ignorance of the fact of death and passes the decree, the decree cannot be treated as nullity. It will be at the most a wrong decree which can be set aside by taking appropriate proceeding. The Court cannot ignore the preliminary decree and refuse to make the final decree because when a preliminary decree is passed, certain rights accrue to the party in whose favour the decree has been passed and those rights cannot be set at naught except by following the procedure which is by way of an appeal or a review. In that case appeal or review application was not filed to challenge the decree and so it is held that the questions cannot be reopened subsequent to the passing of the preliminary decree. In short, what is made clear is that unless the questions

regarding date of the death and survival of the right to sue are raised and decided by factual investigation, the Court cannot refuse to pass the final decree because once the preliminary decree is passed, the same confers the right and imposes the liability which are fixed until the decree is reversed or varied in appeal. The Court then found that final decree could not be refused as the preliminary decree cannot be treated as a nullity. In other words what is made clear is that when there are several plaintiffs or defendants in foreclosure suit and one of the plaintiffs or defendants dies after the preliminary decree is passed, and factual investigation qua the above referred two questions is necessary, it would not be proper to hold that preliminary decree is a nullity, on the contrary if prayer for passing the final decree is made, the same has to be passed and in ignorance of the death if final decree is passed, the same cannot be treated to be a nullity.

12. It may also be stated that where the case is of such a nature that it cannot be disposed of in the absence of the legal representative of the deceased-party, the whole of the suit or appeal, as the case may be, will abate, but where the decree of the lower court proceeds on a ground common to the deceased as well as to the survivors who are parties on record, the later can under Rule 4 Order 41, C.P. Code, appeal against the whole decree and non-joinder of legal representatives will not operate as a bar to the disposal of the appeal and decree passed ensures for the benefit of all the appellants including the deceased. The preliminary decree passed cannot in that case be regarded a nullity because there will be a partial representation to the deceased's estate which is sufficient to preclude the decree being regarded as a nullity, for in mortgage suit several mortgagees or mortgagor's are tenants-in-common of share in the property, and interest of the deceased is represented by others on record. Rule 4 Order 22, C.P. Code does not apply to a case wherein preliminary decree has been passed.

13. Such principle cannot apply when sole plaintiff or the sole defendant or sole appellant or the sole respondent dies because in that case there would not be even partial representation for the deceased. In the case on hand, Purshottambhai Zaverbhai, the sole appellant died before the arguments were concluded and the lower appellate Court, being ignorant of the death, passed the decree. After the death of Purshottam Zaverbhai there was no one on record having interest in common so as to even partially represent him. As sole

appellant died as held in Jiviben Lavji's case (Supra) the, Court lacks of inherent jurisdiction as in fact no proceeding survived on its file and the Court was seized of the lis between the parties. In view of such fact, the decree passed in the case cannot be said to be effective in law as canvassed taking support of the decision in Raddulal's (Supra) case, but it is the nullity.

14. If the decree is found to be a nullity, what should then be done is the next point that arises for consideration. The Bombay High Court in the case of Raddulal Bhurmal (Supra), has held that the decree being a wrong decree will have to be set aside taking appropriate proceedings. If the decree is nullity, the similar view has to be taken. Likewise question arose before the Orissa High Court in the case of Kashinath Mishra and Others Vs. Lokenath Mohapatra and Others - AIR 1961 Orissa 85, wherein it is held that inspite of the death of a party the appeal is heard and judgment is delivered within 90 days of the death but in the absence of the legal representatives on record, the appeal would not abate. In that case, the legal representatives must be given the opportunity of being heard. The decree passed by the appellate court cannot be held to be binding and the party challenging the decree in appeal has a right to support the judgment of the trial court and for that he must be given an opportunity of being heard. Keeping Order 22 Rule 4 (6) of Civil Procedure Code, 1908 in mind, the decision appearing sound is rendered by the Orissa High Court. In the case of Birbal and Others Vs. Harlal Sadasukh and Others - AIR 1953 Punjab 252, which is cited by Mr. Majmudar, learned advocate for the other side, it is held that if the decree is passed against or in favour of a dead person, the same will not be a nullity for all purposes but the decree can be set aside and the legal representatives should be given an opportunity of representing their case before the court. In view of such decisions making the law clear on the point and appearing sound, in the case on hand, the opportunity of being heard and to represent the case, to the appellants in particular to oppose the decree in question, and to the respondents to support the decree undergoing necessary formalities qua joinder of heirs as parties is required to be given for which appropriate order will have to be passed.

15. Whether the appeal so as to challenge the validity of the decree which is a nullity has to be filed, is the question raised. As discussed above, without bringing the heirs and legal representatives of Purshottambhai Zaverbhai the decree came to be passed by

the lower appellate court. The same is therefore a nullity. In view of the decision rendered by the Supreme Court in the case of Vaidya Harishankar Laxmiram Rajyaguru Vs. Pratapray Harishankar Rajyaguru 29(2) 1988 (2) GLR 1182, a decree can be challenged in execution proceeding if it is a nullity, but not otherwise. Mr. M.C. Shah, learned advocate representing the appellant has also drawn my attention to another decision of the Supreme Court rendered prior to aforesaid decision in Vaidya Harishanker. It is the decision in Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others AIR 1970 SC 1475 which is also referred to in the abovestated decision, wherein it is made clear that if the decree is a nullity because of the fact that the heirs and legal representatives were not brought on record and the decree was passed either against or in favour of a dead person the objection in that regard can be raised in execution proceeding. It is then made clear that if the decree is passed by the court having no inherent jurisdiction to pass the decree, the objection as to the validity of the decree can be raised in the execution proceeding if the objection appears on the face of record. If the objection does not appear on the face of the record, and that requires investigation of the question raised and decided at the trial or which could have been decided at the trial but has not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. Pointing out this decision, the submission is that the questions regarding the date of death of Purshottambhai Zaverbhai and hearing being over on a particular day require factual investigation and therefore it was not open to any of the parties to raise the question about nullity of the decree in execution. The course open to the appellant was to prefer the appeal.

16. In both the decisions cited, the Supreme Court has made it clear unequivocably that where the decree is passed without bringing the heirs and legal representatives of the party on record, dying during the pendency of the case wherein hearing is not over the question about the nullity of the decree can be raised in execution. What is made clear in the decision of Vasudev Dhanjibhai (Supra) is that the Court executing the decree cannot go behind the decree, it must take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside a decree even if it is erroneous, the same is still binding between the parties, but when a decree is a nullity because the same is passed without

bringing the legal representatives of the party on record and the same is sought to be executed, an objection in that behalf may be raised in the execution proceeding. What is further held is that if the decree is passed by the Court having no inherent jurisdiction to make it and not local or territorial jurisdiction as it does not go to the root of jurisdiction objection as to the validity can be raised in execution proceeding if the objection appears on the face of the record; where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination or inquiry of the question raised and decided at the trial or which could have been but has not been raised, the executing Court will have no jurisdiction to entertain the objection as to the validity of the decree even on the ground of absence of jurisdiction. The decision, therefore, clearly indicates that with regards to the question of lack of inherent jurisdiction of the Court, the objection can be raised in the execution proceeding if the same appears on the face of the record and requires no factual examination or inquiry qua the question regarding jurisdiction.

17. Both the learned advocates divagated a little. The crucial question posed for consideration is not whether the question about validity of the decree can be raised only in Execution Proceeding, but whether it is open to the party aggrieved by the decree which may be a nullity to prefer the appeal and challenge its validity despite the fact that it is as discussed hereinabove open to raise the issue in execution. The aggrieved party may prefer the appeal if the law for the time being in force permits. Sec. 96, C.P. Code, 1908, the relevant provision provides that save where otherwise expressly provided in the body of the Code or by any other law an appeal shall lie from every decree of the Court. Sub-section (4) of Sec. 96 provides when appeal shall not lie. Sec. 96 does not prohibit the appeal against the decree which is a nullity. No other provision of the Code also prohibits the appeal against the decree if the same is a nullity. For challenging its validity or for determination of its nature as well as adjudication of the rights & obligation of the parties thereunder, and other questions of law & facts arising, the aggrieved party has a right to prefer the appeal on the grounds permissible in law. Sec. 96 or other provisions of the Code does not prohibit the appeal on the ground that the question of nullity can be raised in execution and get the same decided. If in Execution Proceeding raising of the point about nullity of decree is in law permitted, it is in addition to the scope available by way of appeal.

It may however be mentioned that if by preferring the appeal question about nullity is determined, in execution the same point cannot be agitated. In view of such law, the decree passed by the lower appellate Court was appealable for getting its nature decided; and also on other permissible questions of law, which are referred hereinabove. Thus appeal being permissible in law cannot be thrown overboard only on the ground that in execution, the point regarding its nullity can be taken.

18. For the aforesaid reasons, the decree is a nullity. The heirs and legal representatives of Purshottam Zaverbhai did not get the opportunity of being heard and so they can be said to have been condemned unheard. As per the above discussion, the decree being a nullity does not have any force of law and create no right in their favour. If they have the right to support the judgment & decree of the lower appellate court, on some more or other grounds they must be given the opportunity of being heard. Likewise the appellants ignorant about the death at the relevant time could not represent their case in the way they wanted to, had they come to know about the death at the right earnest in respect of the final order that came to be passed. In view of the matter, the decree passed will have to be set aside and the case will have to be remanded to the lower appellate Court for disposal in accordance with law after giving to all the parties reasonable opportunity of being heard. The appellants may, undergoing necessary formalities, prefer application before the lower appellate court for bringing the heir & legal representative of Purshottambhai Zaverbhai on record and the lower appellate court shall consider the same in accordance with law.

19. When heirs and legal representatives of Purshottambhai Zaverbhai were having no opportunity to have their say qua the decree passed and likewise the appellants the appeal is required to be remanded, for necessary formalities and disposal in accordance with law hearing the parties. It will not therefore be just and proper on my part to deal with other questions of law raised by Mr. M.C. Shah, the ld. advocate for the appellants because after remand all such questions will have to be dealt with by the lower appellate Court, and if any legal complexion is given by this Court or indirectly any opinion is expressed, the lower Court may feel embarrassed and may not be able to take its independent view. It may think that the view expressed by this Court must be taken to be the firm opinion one way or the other. I would not, therefore, deal with all

those questions of law raised on behalf of the appellant, better I should refrain from expressing any view.

20. For the aforesaid reasons, the appeal is allowed. The judgment & decree, passed by the lower appellate Court on 1st March 1982 in Regular Civil Appeal No. 76 of 1980, in the absence of legal representatives and heirs of Purshottambhai Zaverbhai, are hereby set aside and the case (appeal) is remanded to the District Court, at Nadiad i.e., lower appellate Court for disposal in accordance with law after giving to all parties reasonable opportunity of being heard. It will be open to the heirs and legal representatives of Purshottambhai Zaverbhai to prefer the application for impleading them as the parties to the appeal and the appellate Court shall dispose the same of in accordance with law.

20. As the Appeal is of 1980, the District Court at Nadiad shall dispose of the appeal within a period of 6 months from the receipt of Record & Proceedings and shall report the compliance.

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